IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| EDGAR M. ELLIS,<br><br>Appellant,<br><br>vs.<br><br>C. J. FITZHARRIS, Superintendent, Correctional Training Facility, Soledad, California, et al.,<br><br>Appellees. | ) | No. 22430<br>22430-A |

# APPELLEES' BRIEF


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APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was invoked under Title 28 United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Appellant has appealed from an order of the United States District Court for the Northern District of California, denying his petition for a writ of habeas corpus.

A. Proceedings in the State Courts.

On December 20, 1946, appellant and one John C. Defer were convicted of murder in the first degree.

Appellant was also adjudged to have suffered two prior convictions. Appellant was sentenced to imprisonment in the state prison for the term of his natural life (TR 35).[1/] There was no appeal from the judgment of conviction, but, appellant did take an appeal from the order of the trial court which refused to correct the record relating to the recordation of the jury verdicts (TR 21). Thereafter, appellant filed petitions for habeas corpus in the Monterey County Superior Court on April 2, 1964, the District Court of Appeal for the State of California, First Appellate District on December 22, 1964, and in the California Supreme Court on or about February 17, 1965 (TR 4). The petitions were all denied (TR 4; AOB 1-2).

B. Proceedings in the Federal Courts.

On or about February 12, 1964, application was made to the United States District Court, Northern District of California for leave to file a petition for writ of habeas corpus. This application was denied on the ground that petitioner had not exhausted his state remedies (TR 3-4; AOB 1-2). A subsequent petition was filed on April 20, 1965 (TR 1; AOB 2).

On June 30, 1965, the Honorable William T. Sweigert, Judge of the United States District Court, issued an order to show cause and the Attorney General's Office, representing respondent herein filed a return to

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1. "TR" refers to the transcript of record of the proceedings in the District Court.

said order on September 17, 1965. Petitioner filed his traverse on October 6, 1965 (TR 17, 20-36, 39-44).

On January 12, 1966, an interim order was filed inviting petitioner to file a supplemental memorandum addressed to the issue of voluntariness which was raised in his petition (TR 46-50). Petitioner filed said supplemental memorandum on March 31, 1966 (TR 53-59).

On August 3, 1966, Judge Sweigert denied the petition, discharged the order to show cause, and dismissed the proceedings (TR 61-72). Notice of appeal was filed on August 29, 1966 (TR 73, 74), and a certificate of probable cause was granted on September 1, 1966 (TR 77).

Thereafter by an opinion filed on April 19, 1967, the United States Court of Appeals for the Ninth Circuit reversed the decision of the United States District Court on the grounds that Townsend v. Sain, 372 U.S. 293 (1963) had expressly repudiated portions of the case of Culombe v. Connecticut, 367 U.S. 568 (1961) upon which the District Court had predicated its opinion. The case was remanded and the court instructed to construe the evidence in light of the Townsend case (TR 81-82, 83).

The cause was once again taken under submission by Judge Sweigert and by an order filed November 9, 1967, the petition was once again denied, the order to show cause discharged and the proceedings dismissed (TR 85-97). Notice of appeal was filed on November 16, 1967 (TR 101), and a certificate of probable cause was issued on November 16, 1967 (TR 99).

## APPELLANT'S CONTENTION

The District Court erred in its application of the rules of Townsend v. Sain, 372 U.S. 293 (1963).

a. The trial judge did not apply the correct procedure to comply with the minimum standards of constitutionality of the proffered evidence.

b. There is no basis for an implied finding of constitutionality.

## SUMMARY OF APPELLEES' ARGUMENT

The record supports the District Court's finding, made pursuant to Townsend v. Sain, 372 U.S. 293 (1963), that the trial judge had complied with the correct procedures in determining the minimum standards of constitutionality in relation to appellant's confession and that the confession was properly allowed into evidence.

## ARGUMENT

Appellant's contentions on appeal consist, we submit, of a re-argument of the facts contained in the transcript of the state trial (AOB 5-9). Thus, he acknowledges that the record does support the District Court's finding that the trial court realized its duty to first determine the voluntariness of appellant's confession, but insists that elsewhere in the record, there is evidence to the contrary (AOB 6). He then states that this conflict can only be reconciled by an evidentiary hearing (AOB 7).

In reply, we would make the following observations: The District Court's prior opinion was reversed,

not because of the District Court's conclusions, but because the District Court had applied an improper standard in reviewing the evidence upon which the conclusions were based (TR 81-82). The order of this Court was that the case be remanded for consideration in accordance with the procedures detailed in Townsend v. Sain, 372 U.S. 293 (1963) (TR 81). The District Court took the case again under submission, and, in a detailed opinion, made its findings and conclusions based solely upon the standards enunciated in Townsend (TR 85-97).

Before detailing that opinion and its manifest correctness, we note a few points of law which give that discussion meaning: The District Court properly based its decision upon the state trial records (after determining that they satisfied Townsend v. Sain - see discussion, infra). That is to say, these records are evidence upon which findings and a decision may be based. Williams v. Beto, 386 F.2d 16, 19 (5th Cir. 1967); Morris v. Boles, 386 F.2d 395, 397 (4th Cir. 1967) fn. 1; Jackson v. People of California, 336 F.2d 521, 522 (9th Cir. 1964).

Where these findings are supported by substantial evidence - that is, by the state records - they are binding upon the Court of Appeals. Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965), cert. denied, 382 U.S. 866; Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964); Robinson v. Johnston, 118 F.2d 998 (9th Cir. 1941), cert. denied, 314 U.S. 675.

Quare, however, as to the standard on appeal to be applied to review the District Court's finding, per Townsend v. Sain, that petitioner received a full and fair hearing in the state court (in this case at his original trial), that all the material facts were developed there and that the record fully supports the state court's factual determination of petitioner's contentions?

We submit that there is no compelling reason nor any case law which would indicate a standard differing from that usually applied to reviewing a district court's finding of fact - for that is precisely what a district court does when it applies Townsend, it makes findings of fact, Morris v. Boles, supra at 397. Therefore, we proceed with our discussion upon the basis that the record substantiates the District Court's finding that the requirements of Townsend were met, and further, that the record supports the court's finding that the confession was voluntary.

Townsend v. Sain, supra, 372 U.S. at 313 holds that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and

fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

The District Court herein, as reflected by its order, recognized its obligations under Townsend, and further it utilized solely those standards for its interpretation of the evidence and the assumptions which were thereafter made (TR 87-89). The evidence upon which these standards and assumptions were applied was, of course, the reporter's trial transcript of petitioner's trial (TR 88).

With reference to the first question of Townsend, that is, were the merits of the now tendered factual dispute resolved in the state hearing, the District Court found that, pursuant to the then prevailing California rule (People v. Fox, 25 Cal.2d 330, 340; 153 P.2d 729 (1944)) the trial court did make an independent determination of the voluntariness of petitioner's confession before allowing it to go to the jury for their similar determination (TR 88). The District Court proceeded then to outline that testimony in the record which showed the voir dire conducted by the court on the question of the voluntariness of the confession which

culminated in the overruling of the defense objection thereto (TR 89).

The District Court then indulged itself in the permissible assumption (Townsend v. Sain, supra, at 314) that the constitutional objection (voluntariness) was rejected on the merits (TR 90). Furthermore, the District Court also permissibly assumed (Townsend v. Sain, supra, at 315) that the state trier of fact applied correct standards of federal law and found the facts against the petitioner (TR 90). Finally, the District Court found in the transcript sufficient indicia which persuaded the court that if the state trial court had believed the petitioner's testimony, he would not have allowed the confession admitted into evidence (TR 91; Townsend v. Sain, supra, 372 U.S. 315).

Appellant points to what he deems to be evidence indicating the trial court did not believe it had the duty to make the initial determinations re voluntariness (AOB 6), he attacks the source of the indicia from which the District Court gleaned the trial court's standards and findings, and he states that one of these indicia, an instruction, did not correctly state the law concerning confessions in California at that time (AOB 7-8).

The response to the foregoing is (1) the District Court had before it all the testimony, (i.e., the entire transcript) and from the conflicting portions of the testimony, made a finding of fact. As stated, supra, this finding is binding upon the Court of Appeal.

Root v. Cunningham, supra; Barber v. Gladden, supra; Robinson v. Johnston, supra. (2) There is no requirement in Townsend that the indicia of the adequacy of a state hearing must come from any particular source. The fact that the District Court looked to the instructions given by the trial court to reconstruct the attitude and standards used by that court seems singularly appropriate and enlightening. (3) Contrary to appellant's assertion, the instruction given by the trial court was absolutely correct. People v. Fox, supra, 25 Cal.2d 339-340. The case cited by appellant (AOB 7) does not even concern itself with involuntary confessions.

The District Court's finding that the second requirement of Townsend was fulfilled is likewise supported by the record. In this regard, the District Court, pursuant to the mandate of Townsend, conducted a careful scrutiny of the state court record (TR 92-93). The District Court referred to and adopted its discussion contained in the previous order (TR 69-72, 92) wherein the court had reviewed the facts of this case according to the precepts contained in the federal cases on coerced confessions and found that in the penetrating illumination thereof the instant confession was voluntary. This discussion disposes of appellant's contention that the instant confession was involuntary because of the elements allegedly showing coercion present in the factual situation of the instant case (AOB 8). Again,

since this finding of fact is supported by the record, it must stand on this appeal.

Appellant does not attack the District Court's findings as to the remaining elements prescribed in the Townsend opinion, and for that reason, we proceed no further in our detailed analysis of the order of the District Court. We would, however, note that this order represents one of the most incisive and exhaustive applications of the rules contained in Townsend that we have encountered to date. The opinion (and this case) represents the classic example of the Townsend rules perfectly applied. We submit that it is entirely free from error.

A short conclusion would seem in order at this juncture. However, we would like to make one short comment lest our silence be deemed a waiver of the point. The "point" is 28 United States Code section 2254(d). It is our opinion that 28 United States Code section 2254(d) was enacted as the result of the Townsend case and was intended to supplant that case with regard to the respect federal courts should give to state evidentiary proceedings. The statute went into effect on November 2, 1966, United States ex rel. Maselli v. Reincke, 383 F.2d 129, 131 (2d Cir. 1967), and we believe it is the standard which the lower court should have been able to use in this case.

However, the lower court could not do so, because the order of this Court dated April 19, 1967, (TR

81-82) specifically required the District Court to interpret the state transcripts under the Townsend rules. Our petition for rehearing was denied by an order filed May 23, 1967, wherein this Court stated:

> "The judgment must therefore be reversed and the cause remanded to the district court for reconsideration in accordance with procedures detailed in Townsend at pages 313-17 of 372 U.S., (and in 28 U.S. Code § 2254 as amended November 2, 1966, by Public Law 89-711, § 2, 80 Statutes 1105), beginning with a determination of whether the state court impliedly found the material facts from the conflicting evidence, and, if so, whether a reconstruction of those findings is possible."

However, this order does not appear in the official transcript, nor does the opinion of the District Court discuss the section. We submit that the burden of the District Court would have been appreciably lightened had it been able to treat this case under the requirements of 28 United States Code section 2254(d) and further such use of the section would be in obvious furtherance of the Legislative intent to attach a modicum of res judicata to state court proceedings.

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## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the opinion of the District Court should be affirmed.

DATED: May 1, 1968

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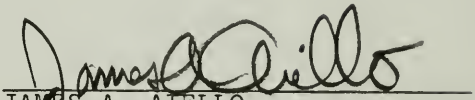
CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: May 1, 1968



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